FILED
AUG 20 1980
MICHAEL RODAK, JR., CLERK

No. 80-42

In the Supreme Court of the United States

OCTOBER TERM, 1979

HOWARD STEVEN STROUTH, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, AND WESTERN UNION TELEGRAPH COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROBERT R. BRUCE
General Counsel
Federal Communications Commission
Washington, D.C. 20544

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-42

HOWARD STEVEN STROUTH, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, AND WESTERN UNION TELEGRAPH COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

---

1. On September 16, 1975, petitioner filed a complaint with the Federal Communications Commission alleging that Western Union Telegraph Company had violated Section 605 of the Communications Act, 47 U.S.C. 605 by unlawfully divulging to a third person a copy of, and other information relating to, a telegram which petitioner sent (Pet. App. 58a). The Commission set the matter for an evidentiary hearing (Pet. App. 1a). After a full hearing, the administrative law judge concluded that on three separate occasions Western Union had made unauthorized disclosures of petitioner's telegram in violation of Section 605 of the Act. The Administrative Law Judge (ALJ), however, also concluded that the petitioner had

failed to establish actual or punitive damages. Accordingly, petitioner was awarded only nominal damages of $18.00 ($6.00 for each of the three unauthorized disclosures) (Pet. App. 90a-93a). The ALJ further concluded that the Commission lacked statutory authority to award petitioner attorney's fees and litigation expenses incurred in the administrative hearing (Pet. App. 89a).

Subsequently, the Commission's Review Board considered lengthy exceptions to the initial decision and affirmed almost all of the ALJ's findings and conclusions (Pet. App. 96a-127a).[1] The full Commission denied petitioner's application for review (Pet. App. 128a).

On March 12, 1980, the United States Court of Appeals for the District of Columbia Circuit affirmed the Commission's determination without an opinion (Pet. App. 144a).

2. Petitioner presents no issue warranting this Court's review.

Petitioner's contention that the Commission wrongly determined that he had not proved actual or punitive damages (Pet. 16-17) is insubstantial. The Administrative Law Judge examined each of petitioner's damage claims and found them to be unproven (Pet. App. 68a-91a). This factual determination is peculiarly within the province of the agency and, having been affirmed by the court of appeals, does not merit this Court's attention. *Ralston Purina Co.* v. *Louisville & Nashville R.R.*, 426 U.S. 476, 477 (1976). To the extent that petitioner contends that he is entitled to damages automatically upon proof of

---

[1]The Review Board found that the ALJ's award of nominal damages of $18.00 served no purpose and reversed that award, and accordingly denied petitioner's complaint (Pet. App. 105a-106a; 119a).

violation of the Act (Pet. 16-17), he is wrong. Nothing in the statute or precedent relieves a claimant of showing that the violation has caused the damages that he seeks to recover. See *Pennsylvania R.R.* v. *International Coal Mining Co.*, 230 U.S. 184, 206 (1913).[2]

The Commission's further ruling that, since Strouth had proved no damages, he should not receive nominal damages was entirely reasonable. As the Review Board explained, such an award would serve no purpose (Pet. App. 105a), and, contrary to petitioner's contention (Pet. 12-14), it was well within the agency's discretion to correct the ALJ's futile action in this regard.

Finally, the Commission's refusal to award petitioner attorney's fees was proper. Petitioner had his choice of proceeding before a district court under Section 206 of the Act, which provides for the award of attorney's fees, or before the Commission under Section 207, which does not so provide. Having chosen to pursue his complaint before the agency, he was bound to accept both its advantages and its disadvantages, one of which is the absence of attorney's fees.[3] See *Alyeska Pipeline Co.* v. *Wilderness Society*, 421 U.S. 240, 257 (1975); *Meeker & Co.* v. *Lehigh Valley R.R.*, 236 U.S. 412 (1915).

---

[2] *Louisville & Nashville R.R.* v. *Ohio Valley Tie Co.*, 242 U.S. 288 (1916), relied on by petitioner (Pet. 16), is not to the contrary; it holds that once a complainant's damage claims are satisfied before an agency, the complainant may not pursue the same claim in a separate court action. *Id.* at 291.

[3] Petitioner's contention that he pursued an administrative rather than a judicial remedy in reliance on advice of a Commission employee (Pet. 18-19) is irrelevant. It is not the business of Commission employees to give legal advice to potential claimants. The fact that the employee's advice was correct, albeit not as full as it might have been, merely suggests the advantages of consulting one's own attorney.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

ROBERT R. BRUCE
General Counsel
Federal Communications Commission

AUGUST 1980

DOJ-1980-08